

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EUGENE JARAMILLO,

Plaintiff,

v.

CIV. No. 12-155 JAP/GBW

SHANNON HAISTEN, DEAN TORRES,
CHERYL FRAISER, FNU KEAR, L. SNEDDEN,
BILLY RYE,

Defendants.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

This matter comes before the Court on the Court's own Order to Show Cause.

Doc. 25. I recommend that the Court dismiss the case without prejudice under Federal Rule of Civil Procedure 41(b) for failure to prosecute and for failure to comply with a court order.

I. BACKGROUND

Plaintiff filed his § 1983 action on February 17, 2012. *Doc. 1.* He subsequently filed a motion for leave to amend the Complaint on March 6, 2012, which was granted on March 8, 2012. *Docs. 5, 6.* Defendant Tim Hatch was terminated from this suit on June 29, 2012 (*doc. 11*) and the remaining Defendants filed a Motion to Dismiss on September 7, 2012. *Doc. 17.* The Motion included a certificate of service stating that service was accomplished by mail. *Id.* at 9. Plaintiff subsequently executed summons for all remaining Defendants listing his address as the same address to which

Defendants served their motion to dismiss. *See docs. 18-22*. Plaintiff did not at any point file a response to Defendants' Motion to Dismiss. On December 5, 2012, Defendants filed a document styled as a reply to their own Motion, in which they requested that per Local Rules 7.4(a) and 7.1(b), Plaintiff's failure to respond be construed as consent to their Motion and that their Motion be granted. *Doc. 23*. The Court issued an order to show cause against Plaintiff on January 3, 2013, ordering that he "show cause why his case should not be dismissed (1) for his failure to respond to Defendants' Motion to Dismiss, or (2) based upon the arguments advanced in Defendants' Motion to Dismiss. Plaintiff [was ordered] to file his response within 17 days of the filing of the Order." *Doc. 25*. Plaintiff was advised that "[f]ailure to respond to [the Order to Show Cause] shall constitute an independent basis for dismissal." *Id.* The time to respond to the Order lapsed on January 22, 2013, with no response from Plaintiff.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 41(b) provides that where "[a] plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." The Tenth Circuit has held that Rule 41(b) also permits courts to dismiss actions *sua sponte* for a plaintiff's failure to prosecute and/or comply with a court order. *Olsen v. Mapes*, 333 F.3d 1199, 1204 n.3 (10th Cir. 2003); *see also Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002) ("A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules."); *Link v. Wabash R. Co.*,

370 U.S. 626, 631 (1962). However, a court should not dismiss an action without prejudice where dismissal would force a plaintiff to refile after the applicable statute of limitations has run. *AdvantEdge Bus. Group v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009). When dismissing a case without prejudice, “a district court may, without abusing its discretion, enter such an order without attention to any particular procedures.” *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007).

III. ANALYSIS

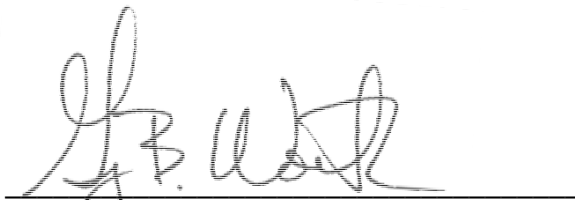
Dismissal without prejudice is warranted here because, by failing to respond to Defendants’ Motion to Dismiss and the Court’s Order to Show Cause, he has demonstrated a lack of interest in prosecuting his case. In fact, Plaintiff has filed nothing in this matter since October 1, 2012. *See docs. 18-22*. Independently, dismissal without prejudice is warranted for Plaintiff’s failure to respond to the Order to Show Cause. Plaintiff was specifically advised that a failure to respond “shall constitute an independent basis for dismissal,” yet it still ignored the Order.

It appears on the face of the Complaint that Plaintiff’s cause of action arose on May 9, 2011. *See doc. 1* at 3. “[I]t is well-settled that New Mexico’s three-year *general* statute of limitations applies to all personal injury claims brought pursuant to § 1983.” *Yruegas v. Vestal*, 356 F. Supp. 2d 1238, 1242 (D.N.M. 2004) (*citing Owens v. Okure*, 488 U.S. 235, 249–50 (1989)) (“[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering 1983 claims should borrow the general or

residual statute for personal injury actions.”). Thus, Plaintiff’s cause of action would not be barred by the applicable statute of limitations until May 9, 2014. Dismissal of Plaintiff’s complaint without prejudice would not, therefore, effectively result in a dismissal with prejudice.

IV. CONCLUSION

Plaintiff failed to respond to Defendants’ Motion to Dismiss or to otherwise prosecute his case since October 1, 2012. He has not shown cause why his complaint should not be dismissed for these failures. In fact, he did not even respond to this Court’s order to show cause despite being advised that failing to respond would constitute an independent basis for dismissal. Dismissal of this action at the current time will not result in Plaintiff’s inability to refile this action on the basis of a statute of limitations bar. For those reasons, I recommend that Plaintiff’s complaint be DISMISSED without prejudice.



GREGORY B. WORMUTH
UNITED STATES MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**